1990

Original Intent, History and Levy's Establishment Clause. Book Review of The Establishment Clause: Religion and the First Amendment, by Leonard W. Levy

Ruti Teitel
New York Law School

Recommended Citation
15 Law & Soc. Inquiry 591 (1990)

Original Intent, History, and Levy's *Establishment Clause*

Ruti Teitel

LEONARD W. LEVY, *The Establishment Clause: Religion and the First Amendment*. New York: Macmillan, 1986. Pp. xvi + 236. $16.95.

When one of our leading constitutional historians takes on the doctrine of "original intent," there is reason for celebration, but also for alarm. On the one hand, it is good to see some serious scholarship in an area that has been marked by rhetoric. On the other, the very act of doing historical work on the question tends to legitimate it. Worse yet, there is the risk that incorrect conclusions will be drawn from the historical record and that the nature of historical inquiry itself will be transformed by the enterprise.

Leonard Levy's *The Establishment Clause* displays both the promise and the problems of work of this type. The book offers important historical work on the religious practices in the states at the time of the Constitution's ratification, but the record Levy presents fails to support his position in the original intent debate. This debate, which is really two debates, questions whether the establishment clause should be interpreted today as it was understood at the time of the founding; and if so, whether the founders favored general, nondiscriminatory aid to religion. Without expressly taking a stand on the first question, Levy answers the second by arguing that nondiscriminatory aid for religion was not supported at the time the Bill of Rights was enacted. Yet, by grounding his arguments for a "no-aid" or separationist reading of the establishment clause on evidence from the time of the framers, Levy by implication takes a pro-original in-

Ruti Teitel is professor of law at New York Law School. J.D. 1980, Cornell Law School.

0897-6546/90/1503-0010$01.00

tent stand. Rather than quelling the original intent debate, Levy adds fuel to the fire.

I begin this review by exploring the parameters of the original intent debate. I show where Levy fits in as a historian and argue that historical inquiry of the type used in *The Establishment Clause* does not provide the certainty claimed by Levy and other advocates of the doctrine of original intent. In part III, I compare Levy's conclusions with those of other religion clause historians and note their conflicting conclusions regarding the interpretation of original sources. In part IV, I argue that the indeterminacy of historical interpretation limits the usefulness of original intent in constitutional adjudication.

In part V, I identify a parallel problem for the historians of original intent. Just as originalist constitutional lawyers have turned to history, so the historians of original intent have turned to law for added understanding of the legal framework. I suggest some reasons for this development; and I also indicate some of the problems which arise in the interaction of the historical and legal frameworks. Constitutional adjudication asks a different question than does historical inquiry. Yet, the historical inquiry in *The Establishment Clause* is cast in the terms of a current legal dispute. Because the adjudicative context transforms the historical understanding, the historical understanding I argue cannot serve as an independent basis for constitutional decisionmaking. This observation challenges the notion that history can provide objective standards for interpretation of constitutional text—the essential claim of those who focus on original intent.

In part VI, I contrast the original intent doctrine with the current approach to history in church-state jurisprudence. I argue that the Supreme Court has rejected original intent in favor of what I term "constitutive" or "constitutional intent"—intent that has endured from the time of the framers to the present. The Court looks to history to see what traditions have been established. Tradition is the preeminent source for the Court's understanding of the constitutive in contemporary church-state relations.

Last, I critique the Court's "tradition" doctrine. In contrast to an original intent approach to history, the Court's use of history allows some departure from past understandings, but analysis of the case law shows that the Court's adherence to community traditions in its interpretation of the establishment clause ultimately cannot address the essential tension at the core of the religion clauses: the conflict between government protection of the public good and the individual's pursuit of religious freedom.

I. THE ORIGINAL INTENT DEBATE

Levy opens by posing the question: Does government support for

religion violate the "policy embodied in the establishment clause"? Levy then posits that the answer to this question necessarily warrants an "examination of history." A historian by training, Levy understandably responds as a historian to the contemporary call for a return to original intent. Thus, in *The Establishment Clause*, Levy attempts to provide a historical rebuttal to the claims of the original intent school; and it is Levy's thesis that original intent opposes any form of government aid to religion, whether or not that aid gives preference to one religion over another. But *The Establishment Clause* ultimately fails to make the case that the answer to Levy's question is discoverable in history.

Levy has become enmeshed in a national debate about constitutional theory. At issue is whether broad constitutional provisions should be interpreted within the parameters of the text and the original intent of the framers. Variously know as the "originalism" or "interpretivism" debate, it is a debate over the proper sources for constitutional adjudication which juxtaposes the interpretation of text, and authors' intent, with sources external to the constitutional text, such as precedent, community consensus, or political theory.

The originalism debate represents the culmination of more than a decade of challenges to Supreme Court decisions involving questionable constitutional analysis. In 1954, *Brown v. Board of Education*,[1] with its reliance on social and cultural facts, suggested that the relevant constitutional standards lay outside the Constitution and even the legal realm. In 1973, the debate was refueled by *Roe v. Wade*.[2] Unlike prior cases which claimed to be interpreting constitutional provisions and their "penumbras,"[3] *Roe* was overt in eschewing reliance on constitutional text. In 1985, the debate was reopened by then Attorney General Edward Meese who, in a widely publicized speech, accused the Supreme Court of "judicial tyranny," and called for a return to a "jurisprudence of original intent."[4]

In *The Establishment Clause*, Levy identifies the originalism debate with the new Right and the Reagan administration.[5] But this characterization fails to adequately capture the dimensions of the public debate generated by Meese's comments. Within the legal and academic communities

1. 347 U.S. 483 (1954).

2. 410 U.S. 113 (1973).

3. Griswold v. Connecticut, 381 U.S. 479 (1965).

4. Address of Edwin Meese Before the ABA (July 9, 1985), "The Great Debate: Interpreting Our Written Constitution," Occasional Paper No. 2, Federalist Society, 1986; W. Brennan, "The Constitution of the United States: Contemporary Ratification" (Address to Georgetown University, 12 Oct. 1985), 19 *U.C. Davis L. Rev.* 2 (1985); 27 *S. Tex. L. Rev.* 433 (1986); see also J. P. Stevens, "Construing the Constitution" (Address to Federal Bar Association, 23 Oct. 1985), 19 *U.C. Davis L. Rev.* 15 (1985). See also J. P. Stevens, "The Supreme Court of the United States: Reflections After a Summer Recess," 27 *S. Tex. L. Rev.* 447 (1986).

5. See also D. Laycock, "Constitutional Theory Matters," 65 *Tex. L. Rev* 767, 768–69 (1987) (referring to the debate over "Reaganite Constitutional Theory").

the issue of constitutional interpretation and original intent became the central debate of the 1980s.[6]

In the constitutional decisionmaking concerning religion, the originalism debate has been at its most contentious. In the 1960s and 1970s, the Supreme Court invalidated government aid to religious schools, as well as a variety of religious practices in the public schools.[7] Originalists challenged the Court's interpretation in these cases, arguing that the original intent of the framers favored government aid to religion so long as it was nonpreferential.[8]

Advocates for nonpreferential aid claim to have history "on their side." And it is this assertion that history lines up on the side of the proponents of aid to religion that animates Levy. In *The Establishment Clause*, Levy sets out to reclaim for history what he asserts is its rightful home in the separationist camp. Yet, while *The Establishment Clause* sets out to shake the alliance between those supporting nonpreferential government aid to religion and originalists asserting that this was the framers' intent, to the extent that Levy also grounds his response in originalist history, he agrees more than he disagrees with his alleged opponents. As a result, neither side recognizes the complexity of the interaction between history and today's church/state problems. Historical facts simply cannot be marshalled to shore up one constitutional thesis or another. As Levy shows but paradoxically does not recognize, the very framing of the constitutional question shapes the historical facts.

---

6. See, e.g., J. Ely, *Democracy and Distrust* (1980): M. Perry, "The Authority of Text, Tradition and Reason," 58 *S. Cal. L. Rev.* 551, 572-87 (1985); L. Simon, "The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?" 73 *Calif. L. Rev.* 1482 (1985).

7. See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971); Engel v. Vitale, 370 U.S. 421 (1962).

8. While the proponents of the original intent method of interpretation and of government aid to religion overlap, they are not identical. Originalist proponents of government support for religion include: W. Berns, *The First Amendment and the Future of American Democracy* (1976); G. Bradley, *Church-State Relationships in America* (1987); R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982); M. Howe, *The Garden and the Wilderness* (1965); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Inst. 1978) ("Malbin, *Religion and Politics*"); see also E. Corwin, "The Supreme Court As National School Board," *Law & Contemp. Prob.* 14 (1949); J. Antieau, L. Downey, & C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964); J. O'Neill, *Religion and Education Under the Constitution* (1949).

There are advocates of government aid for religion on nonoriginal intent grounds, as well as originalists who oppose government aid. Leading advocates of separation of church and state from an intentionalist perspective are L. Levy, *The Establishment Clause*; D. Laycock, "Nonpreferential Aid to Religion: A False Claim About Original Intent," 27 *Wm. & Mary L. Rev.* 875 (1986); P. Kurland, "The Origins of the Religion Clauses," 27 *Wm. & Mary L. Rev.* 839 (1986). See also L. Pfeffer, *Church, State and Freedom* (1967) (replying to originalist accommodationists), and T. Curry, *The First Freedoms* 83 (1986) ("Curry, *First Freedoms*").

II. METHODOLOGICAL CHOICES

A. Text Versus Intent

Without any discussion of methodology, Levy's inquiry into the proper interpretation of the establishment clause adopts a strict intentionalist method. He launches into a review of a variety of sources of evidence of original intent, but the consideration of constitutional text as one such source is conspicuously absent (at xiv). Levy's choice of method is perhaps consistent with his training as a historian. But as a matter of constitutional or even legal interpretation, choosing original intent over text would seem to require some explanation, if only because the language of the establishment clause is understandable without looking to the intentions behind its text.[9]

In circumventing the text of the establishment clause, Levy misses the fact that, as a product of the constitutional amendment process, the text has authority over any other evidence of legislative intent.[10] It is the text, not the intent underlying it, that was voted on, and that represents the consensus of the full constitutional process.[11]

One reason Levy avoids the text is that he regards the breadth of the establishment clause language as vague and indeterminate, and thus not useful as a sign of the framers' intentions. For Levy, text merely fixes a time for determining a historical understanding (see at xiv).[12] Yet paradoxically, it is the breadth of the language which supports Levy's anti-aid position. The text of the establishment clause is short and simple: "Congress shall make no law respecting an establishment of religion . . . ."[13] A plain reading of the text indicates that the bar is absolute; it does not distinguish government support on the basis of religious preference.

In evading constitutional text, Levy misses other provisions regarding religion which also support his argument. Article VI, at section 3, which prohibits religious oaths as conditions for federal office, provides "no religious Test shall ever be required as a Qualification to any office or Public

9. The strict intentionalist approach conflicts both with ordinary legislative interpretation method and, interestingly as a historical matter, with the approach to statutory interpretation employed during the founding period, which looked first to objective evidence of intention, and not legislative history. See J. Powell, "The Original Understanding of Original Intent," 98 *Harv. L. Rev.* 885 (1985).

10. See Ely, *Democracy and Distrust* 12, 16 (1980).

11. See F. Schauer, "An Essay on Constitutional Language," 29 *U.C.L.A. L. Rev.* 797, 809 (1981). F. Easterbrook, "The Role of Original Intent in Statutory Construction," 11 *Harv. J.L. & Soc. Policy* 59, 60 (1988).

12. "History suggests answers but the constitutional text does not" (at xvi). P. Brest, "The Misconceived Quest for the Original Understanding," 60 *B.U.L. Rev.* 204, 209 n.28 (1980). Some commentators suggest that broad text provides the parameters for acceptable interpretation. See R. Dworkin, *Law's Empire* 398 (1986), and Schauer, 29 *U.C.L.A. L. Rev.* at 829–30.

13. U.S. Const. Amend. I, cl. 1.

Trust under the United States." Like the establishment clause, Article VI is absolutist. It bars all religious oaths—not merely those which are coerced. Analyzed together, the no-oath clause of Article VI and the establishment clause of the First Amendment provide textual parameters justifying a constitutional interpretation that would bar even nonpreferential governmental aid to religion. Understandably those arguing for such a distinction must turn from text to other evidence of intent. But it also follows that Levy and others advocating a reading of establishment which does not distinguish on the basis of preference need not turn to original intent, but may instead rely on textual analysis.

B. Founders' Intent and State Practice

Much of the discussion about the uses of history in constitutional interpretation centers on questions of methodology and, in particular, on sources. Is original intent to be found in the practices of the period, in its legislative history, or in the statements of the framers? And with respect to the latter, who are the framers? Are they the Constitution's debaters, its ratifiers, or their constituents?[14]

Levy focuses on state practice and simply assumes a connection between state customs and federal laws. In so doing, he triggers yet another facet of the original intent debate. To rely on state practice as evidence of original intent ignores the reality that the equation of federal and state standards is a modern development attendant to the evolution of the incorporation doctrine, and was itself the subject of heated and prolonged debate among intentionalists.[15]

Based on the practices of the states at the time of the ratification of the Bill of Rights, Levy asserts it is the intent of the establishment clause to bar all aid to religion, including nonpreferential aid. By showing that there were "multiple" establishments in those states that had established religion by law, Levy argues that at that time "aid" was understood to mean aid to more than one religion. Six states had establishment of reli-

14. *See* Brest, 60 *B.U.L. Rev.* at 214, 220.

15. For an intentionalist historian's arguments against incorporation of state and federal constitutional standards see R. Berger, *Government by Judiciary* (1977); For an intentionalist lawyer's argument against incorporation see E. Meese, "The Supreme Court of the United States," 27 *S. Tex. L. Rev.* 455 (1986). For historical sources supporting incorporation via the privileges and immunities clause, see Cong. Globe, 39th Cong., 1st Sess. 2765–66 (1866) (remarks of Sen. Howard). See generally M. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986). See J. Story, *Commentaries on the Constitution of the United States* (Rotunda & Nowak ed. 1986).

In addition to the intentionalist argument against incorporation is the current call for "interpretive communities," which would also seem to argue against an automatic equation of state and national understandings. See, e.g., M. Tushnet, *Red, White, and Blue* at 315–16 (1988).

gion by law and of these, all six had multiple establishments; none had an exclusive, single establishment. From this, Levy deduces that in these states, "establishment" meant public support of religion on a "nonpreferential" basis and that these practices inform what we should understand by "establishment" in the federal Constitution.

Levy's analysis involves several interpretive leaps. The first is the premise that the Constitution was intended to regulate state practices. *The Establishment Clause* provides no historical support on this critical point. In fact, what evidence exists suggests the very opposite. The debates of several of the state constitutional conventions reflect an understanding that the constitutional definition of establishment was different from that of the states.[16]

The critical leap for Levy is his equation of "multiple establishments" with "nonpreferential aid." In fact, the historical context suggests otherwise; even at the time of the founders the multiple establishments were clearly regarded as aid and simply represented a political compromise between factions divided over the question of established religion (at 26). Consider the example of Massachusetts, where, as in a number of other states in the Northeast, there was establishment by "local option." The state constitution provided for a "town parish," which was an established church in every town elected by majority rule. The local option plan also contemplated compulsory tax contributions to the church of the taxpayer's choice.

Although as a theoretical matter, the local option system allowed religious minorities "equal opportunity" to establish the church of their choice, the system ultimately created a preferential establishment, as each town in the state could officially recognize only one church (see at 44–46, discussing Vermont).

Moreover, it was clear to the founders that the local option plans discriminated along religious lines. In those states having local option plans, there was continual conflict over which religious societies were eligible to receive taxes.[17] Further, not all religions were equally situated for the receipt of government benefits. For reasons of religious doctrine, Baptists and Quakers opposed compulsory contributions, yet were not exempted from the compulsory taxes.[18] These historical problems

16. See Levy at 33 (regarding the 1820 Convention to reconsider art. 3 of the 1780 Massachusetts Constitution). See also McDaniel v. Paty, 435 U.S. 618, 629 (1978) (Brennan J., concurring) (discussing the irrelevance of state practices to the federal understanding of the establishment clause).

17. In Massachusetts, for example, there was a dispute between the trinitarians and the unitarians as to which was the "official" religious society and accordingly authorized to receive the state disbursement of taxes.

18. In Connecticut, to be excused from taxes supporting the majoritarian Congregationalist establishment, the "dissenters," consisting of Baptists, Methodists and Episcopalians, were required to obtain a certificate showing membership in and tax

undermine Levy's analogy of the plural establishments of religion in some states to today's concept of nonpreferential aid to religion.

Notwithstanding the minimal historical support for his argument against all government assistance, by focusing on state practices Levy seems to get the upper hand of the historians' debate. In sharp contrast, in critiquing the pro-aid position, Levy adopts a strict intentionalist position, insisting on precise historical examples or language which would reflect the specific intent to allow nonpreferential aid to religion.

Levy asserts that the jurisprudence of "original intent" is an "invented" history, history manipulated for a purpose, to adjudicate contemporary church-state conflicts. Yet his historical account seems to suffer a similar flaw. Rather than allowing the historical inquiry to shape his conclusions, Levy imposes the contours of today's original intent debate on the practices of the past.

III. THE HISTORIANS' DEBATE

In *The Establishment Clause*, Levy sets out to respond to the Reagan administration and its supporting historians[19] who argue that original intent conclusively favors some form of government sponsorship of religion. Relying on state practice, as discussed above, Levy claims in rebuttal that the original evidence lines up conclusively against any form of aid to religion—even where it is nondiscriminatory. But the extreme positions staked out by Levy do not fully describe the historians' debate over original intent.

One of Levy's students, Thomas Curry, disputes Levy's basic premise that the multiple establishments were nonpreferential.[20] Curry contends there is no historical evidence that the founders saw any distinction between aid to one church and aid to several. Whereas the rhetoric of the period described establishment as aid to one church, the founders' practical experience concerned multiple establishments. In fact, Curry argues, the New England constitutions that provided for multiple establishments

---

contributions to a recognized religious body. The certificate procedure marked one as a "dissenter" and often resulted in social stigma. See E. Gaustad, *The Emergence of Religious Freedom, Religion and the State* (J. Wood ed. 1985). Also undermining the equation of the multiple establishments with nonpreferential support was the existence in some state constitutions of additional "nonpreference" clauses, e.g., Massachusetts and New Hampshire; if you accept Levy's argument these would seem redundant (see p. 38). Levy also does not explain North Virginia's constitution, which proscribes establishment and defines it as unidenominational. These examples illustrate the problem with the term "nonpreferential aid"; it assumes a consensus among religions on the valuation of government benefits. If there was no consensus on this question two hundred years ago, today our greater religious diversity makes it virtually unattainable.

19. See, e.g., Malbin, *Religion and Politics* (cited in note 8). R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982).

20. See Curry, *First Freedoms* at 210–11 (cited in note 8).

were never intended to be examples of nonpreferential aid; instead they were political compromises deliberately intended to limit the dominance of the Congregational Church.[21] Curry's analysis of the ratification process of the Constitution further threatens Levy's reliance on state practice. Some of the ratification debates indicate that "church-state" relations were in no way intended to define the relations between churches and the federal government.

Beyond state practices, Curry examines other historical evidence such as the debates on the Bill of Rights, and concludes that the founders' intent concerning nonpreferential aid is inconclusive. Whereas Madison and Jefferson opposed general assessments, other founders appear to have advocated preferential government support.

Curry offers an alternative interpretation of the problem of government aid to religion. At the time of the founders, he suggests, government aid was not analyzed on the basis of preference at all, as it is today, but instead on the basis of coercion. Of the 11 states ratifying the First Amendment, Curry observes, 9 opposed mandatory government assistance to religion through taxation but favored voluntary private support.[22]

The historians' debate is complicated further by Douglas Laycock who, in a recent article, "Nonpreferential Aid to Religion: A False Claim About Original Intent,"[23] agrees with Levy that the founders recognized distinctions between preferential and nonpreferential aid, and opposed both. But Laycock disagrees with Levy and agrees with Curry on the relevance of state practice as historical support for this conclusion.

Unlike Levy, Laycock's conclusion that the framers opposed nonpreferential aid eschews evidence of state practices. For Laycock, constitutional text and its legislative history are evidence of original intent opposing general aid to religion. As to text, the broad language of the establishment clause, its use of the term "establishment" rather than national church, and the general preposition "respecting" religion, rather than "one" or "a," are indicia of the intent to bar all government support to religion.[24]

As to Levy's reliance on state practice, Laycock, like Curry, interprets the multiple establishments to have been in no way nonpreferential.[25] Whereas Curry construes the multiple establishments as evidence that the founders had no practical experience with nonpreferential aid, for Lay-

21. See *id.* (discussing general assessments).

22. See *id.* at 197–98.

23. See 27 *Wm. & Mary L. Rev.* 875 (cited in note 8).

24. *Id.* at 910.

25. Laycock focuses on the local option system of establishment in Massachusetts, which, although democratically elected, constituted an establishment of majority rule. As concerns Levy's reliance on state practice, Laycock also observes that there are added federalism problems.

cock, it was precisely the day-to-day experience with the multiple establishments that enabled the founders to distinguish between preferential and nonpreferential aid.

IV. THE HERMENEUTICS OF ORIGINAL INTENT

Together Levy and Curry provide ample evidence to refute the position of historians claiming that the founders supported nonpreferential governmental aid to religion. Whether through Levy's unequivocal or Curry's more equivocal position, one thing is clear: the waters have been muddied, there is evidence on the other side.

But the Levy/Curry debate also illustrates the indeterminacy that lies in historical interpretation and thus challenges the use of original intent in constitutional interpretation. Levy encounters a basic problem in using the original intent approach to respond to the question of the founders' support of nonpreferential aid. There is simply no historical evidence of the founders' opinion on nonpreferential aid. The issue did not exist at the time. In the absence of such evidence, Levy turns to historical analogues. He takes the state practices at the time of the ratification regarding multiple establishments and analogizes these to today's concept of nonpreferential aid. But his reliance on historical analogues threatens the very search for certainty spurring his historical inquiry. Having turned to original intent to address the indeterminacy in constitutional interpretation of the establishment clause, Levy is thereafter unable to confront the indeterminacy in his own historical interpretation.

The question Levy sets out to answer is, What did the framers intend concerning nonpreferential government aid to religion? But Levy's question assumes that there is a specific intent about nondiscriminatory aid which we can recover. We know the founders spoke and wrote about religion, particularly during the period of the ratification, and this raises a presumption favoring the use of original intent in today's church-state controversies.

But the differing views encompassed by the historians' debate indicate there may not be a specific intent that can be recovered regarding our present concept of nondiscriminatory aid. Curry maintains that at the time of the founding the word "nonpreferential" had no meaning. Levy appears to concede this in failing to proffer any evidence about the term nonpreferential as such, and in relying instead on analogues to the state multiple establishments.

Levy's inquiry is inextricably tied to the vocabulary of today's church-state debate.[26] The interpretational problems he encounters are a result of

26. See M. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," 96 *Harv. L. Rev.* 781, 793 (1983).

the distance between the context of today's debate and the historical context of the period of the Constitution's adoption.[27] One way this distance reveals itself is in changes in the language of the debate over time.[28]

To the extent it is a contemporary debate which engenders Levy's historical inquiry, *The Establishment Clause* reflects the "hermeneutic dilemma." In historical interpretation, it is the irresolvable problem of a historian's inability to be simultaneously aware of both present and historical horizons.[29] To reconstruct the historical, Levy puts himself in the historical context. Yet even as he does so, he loses the frame of reference of today's church-state controversies.[30] The hermeneutic problem is an inexorable obstacle in the search for a certain historical understanding of original intent.[31] When the original intent inquiry is itself characterized by uncertainty, it cannot lay claim to curing the indeterminacy of constitutional interpretation. Original intent simply does not decide the case. It cannot provide the answers claimed by Levy and other intentionalists to contemporary constitutional church-state conflicts, such as the issue of nonpreferential government aid to religion.

That history does not provide a certain answer on the meaning of establishment of religion should not have come as a surprise. Since the late 19th century, historians have confronted the elusiveness of objective knowability in historical interpretation.[32] In light of the longstanding debates within the American historical profession concerning the problem of standards of understanding in history and, by contrast, our comparatively recent discussions about indeterminacy in legal interpretation, that intentionalists from within the legal profession could have carefully nurtured the belief that the standards for "objective" interpretation would derive from history reflects a deliberate circumvention of a century of historical writing on standards of historical knowability that poses a serious challenge to the law's use of history in its pursuit of truth.

V. LAW AND HISTORY AND HISTORY AND LAW

A. Uncertainty in Law and History: The Russian Doll Problem

Part IV above discusses one hermeneutic problem in Levy's approach

27. See Brest, 60 *B.U.L. Rev.* at 219 n.52 (cited in note 12).

28. See Schauer, 29 *U.C.L.A. L. Rev.* 831 (cited in note 11).

29. See H. G. Gadamer, *The Principle of Effective History: The Hermeneutic Reader* 270 (K. Mueller-Vollmer ed. 1988).

30. Gadamer notes the very idea of the hermeneutical "situation" means "we are in the midst of it" and, therefore, are unable to have any "objective knowledge of it." *Id.*

31. *See id.* at 270.

32. See Kloppenberg, "Objectivity and Historicism: A Century of American Historical Writing," 94 *Am. Hist. Rev.* 1011, 1012 (1989).

to original intent: the problem of time, of the unknowability today of the historical tradition as it was. But there is another hermeneutic issue. Levy's problem in interpreting historical evidence of the founding is affected by the judicial context of his inquiry. Not only is he going back into history to answer today's disputes, but he is framing the questions as they are framed by a particular group of lawyers.

Adjudicative context also poses further interpretational problems. When judges and lawyers look to history, the adjudicative context affects their historical interpretation. So, for example, Levy's *Establishment Clause* responds to a contemporary question about nonpreferential aid—as it is framed in contemporary constitutional caselaw. It is the current constitutional disputes that define Levy's historical inquiry, and therefore there is a clear circularity implicit in his reliance on original intent evidence to resolve these constitutional disputes. This circularity frustrates attainment of any independent objective meaning in constitutional interpretation on the basis of history.

Rather than helping to resolve the uncertainty in constitutional interpretation, the historical inquiry only compounds the uncertainty. Like nesting Russian dolls, the problems of interpretation do not disappear but become more manifold.

B. History and Law

The interdisciplinary inquiry has not been a one-way street. Just as lawyers have turned to history to resolve issues of constitutional doubt, so, too, intentionalist historians such as Levy, Cord, and Malbin have turned to law, and taken their debate on original intent to the legal framework for their own purposes, for elucidation of their historical conclusions.[33] As discussed above, the historians' interpretation of original intent is shaped by the context of constitutional adjudication. And it is the adjudicative framework that is increasingly sought out by intentionalist historians.

Levy's coming to the law is symptomatic of a growing intervention by historians in the legal process. This has taken different forms in recent years. Historians have increasingly participated in the legal process as expert witnesses. Commentators from within the legal community appear to consider this development to be motivated largely by lawyers and their clients. Yet as is reflected in the historians' debate over original intent, in fact the legal process is increasingly being sought out by historians, as expert witnesses, as *amicus curiae*, and as commentators on caselaw, concern-

33. Another example from outside of the church-state dispute is Raoul Berger; *see Government by Judiciary* (1977).

ing issues of interpretation in constitutional adjudication,[34] but also in other areas of public debate, among them civil rights[35] and women's history.[36]

The turn to the law follows a current trend among historians toward the social sciences for methodology which might enable study on a smaller scale.[37] The adjudicative framework provides historians with a case method for testing a historical theory, for instance, about the meaning of the establishment clause. The application of a historical theory to a particular set of facts in the legal context provides the parameters within which a theory can be verified—in a limited context—but perhaps at an attendant higher standard of knowability.[38]

In addition to providing another methodology, the adjudicative framework—in particular, constitutional adjudication—affords historians an opportunity to participate in current events. Law enables applied history; through their involvement in caselaw, historians can connect the past to the present. And insofar as adjudication implies judgment, and a "right" answer, it allows historians to take a stand on political questions.[39]

Paradoxically in the legal community, the risks of historian intervention in the legal process have been discussed without any mention of the attraction of legal methodology.[40] By contrast, constitutional scholars have long touted the use of history in constitutional interpretation without addressing the problems of historical interpretation.

VI. ORIGINAL INTENT, CONSTITUTIONAL INTENT, AND THE SUPREME COURT

A. Original Intent and Constitutional Intent

The discussion in parts IV and V of the hermeneutical problems in

34. In other church-state debates, e.g., over creationism in the public schools; see Bolton, "The Historian as Expert Witness: Creationism in Arkansas," 4 *Pub. Hist.* 59–68 (1982).

35. See P. McCrarn & J. G. Hebert, "Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases," 16 *S.U.L. Rev.* 101 (1989). See, e.g., Mobile v. Bolden, 446 U.S. 55 (1980).

36. See T. Haskell & L. Levinson, "Academic Freedom and Expert Witnessing: Historians and the Sears Case," 66 *Tex. L. Rev.* 1629 (1988); "Women's History Goes on Trial," 2 *Signs* 757 (1986).

37. See M. Kammen, *Selvages and Biases: The Fabric of History in American Culture* 51 (1987).

38. Compare legal fact-finding standards, e.g., preponderance of the evidence, and beyond a reasonable doubt, with historical fact-finding standards. See Jacques Barzun & H. F. Braff, *The Modern Researcher* (1985); R. G. Collingwood, *The Idea of History* (1976).

39. See, e.g., "Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing," 6 *Public Hist.* 5, 7 (1984).

40. See, e.g., Haskell & Levinson, 66 *Tex. L. Rev.* 1629.

the use of original intent history in constitutional adjudication uncovers a fundamental conflict between the theory of original intent and hermeneutical methods of historical interpretation. Under the theory of original intent, history is said to be relevant because it is asserted to be continuous with the present. Like originalism, a hermeneutic approach traces areas of continuity between the time of the founding and today; but by contrast, a hermeneutical analysis also tries to understand the founding in its historical context, even while it distinguishes changed circumstances and discontinuities.

The Levy-Curry-Laycock debate discussed in part II, I believe, reflects areas of discontinuity between original and contemporary understandings of church-state relations. But my perception of discontinuities itself raises questions about historical interpretation. As *The Establishment Clause* illustrates, ambiguous original history seen from the perspective of a contemporary debate can be misread as continuous with contemporary practices.

The remaining question is how to respond to the central intentionalist claim that history is only relevant where it is continuous with contemporary practices. In America, where our church-state relations are distinguished by issues of diversity and pluralism, the consensus of a religious community eludes us. But this seeming difficulty appears to have only heightened the allure of original intent. Even as our community grows more fractious, the call for original intent grows more insistent. While it is an apparent paradox, I maintain that the call for original intent represents a search for national roots, for a "sharable past" or "constitutive history," a history that can do the difficult work of cohering our community today.

The Supreme Court has also joined in the pursuit of a constitutive history, but without adopting an original intent approach. In its church-state jurisprudence the Court has looked to evolving history, rather than original history, and thus it has been able to neatly sidestep the hermeneutic problems presented by original intent, as well as the wearying debate over its use.

Unlike intentionalism, which arrogates automatic relevance to original history, the Court's historical analysis traces the evolution of our constitutional understandings over time. In its interpretation of the religion clauses, the Court studies the development of original understandings from the founding through to contemporary times to determine whether the original understanding of a protected religious liberty or a prohibited establishment continues. Where there is continuity, original intent guides the Court, but only because it has acquired the legitimacy of constitutive intent. Pursuant to this historical inquiry, however, the Court also recognizes discontinuities between today's practices and those of the founding period. By exposing discontinuities where they exist, the Court creates a

relegable past—distinguishable from a sharable history—those understandings which have become entrenched over time and represent enduring traditions for today's community.

B. Tradition and the Case Law

Inquiry into longstanding history or "tradition" is the Supreme Court's fundamental standard in the jurisprudence of the religion clauses.[41] In *Everson v. Board of Education*, its very first case under the establishment clause concerning state aid to parochial schools, the Court declared its interpretation of the establishment clause would be one which accords with history.[42] "History" for the Court was not confined to original history but rather spanned our entire national history. Rather than beginning its analysis with the history of the founding, the Court began much earlier with English history.[43] It traced the concern with tax support for churches through to the colonial period and the founding.[44] Government financing of religious institutions, the Court observed, was the central concern animating the enactment of the religion clauses.

The Court's linkage of prerevolutionary English history to the colonial understanding of establishing is not an obvious connection. The English history of establishment, a product of a monarchical government, was arguably different from the American system of popularly and democratically elected establishments. But the Court asserted that they raised similar concerns about the relations between church and state. By joining the longstanding objections to tax-subsidized clergy to the newer interest in aid to sectarian schools, the Court was able to create a continuous history opposing subsidies to sectarian schools.

The Court has used a similar approach to history in evaluating the constitutionality of nonfinancial governmental sponsorship of religious practices. In *Engel v. Vitale*, its first consideration of prayers in the public schools, the Court traced the history of government-sponsored prayer from the English period through to colonial and contemporary history. Throughout the years, the Court observed, there has been continuous opposition to government-sponsored prayer. Given this history, the Court

41. See R. Teitel, "The Supreme Court's 1984–85 Church-State Decisions: Judicial Paths of Least Resistance," 21 *Harv. C.R.–C.L. L. Rev.* 651, 667–69 (1986); see, e.g., Wallace v. Jaffree, 472 U.S. 38, 52–55 (1984).

42. 330 U.S. 1, 8 (1946). Interestingly in *Everson* the dissent also would claim the authority of history. See *id.* at 33 (Rutledge, J. dissenting) ("No provision of the Constitution is more closely tied . . . to its generating history"). But see *id.* at 28 (Jackson, J., dissenting) ("I cannot read the history of the struggle to separate political from ecclesiastical affairs without a conviction that the Court today is unconsciously giving the clock's hands a backward turn").

43. *Id.* at 8.

44. *Id.* at 9–13.

concluded that school prayer, like government-sponsored prayer generally, poses an unconstitutional establishment.[45]

Just as it has invoked history to recognize longstanding establishments, so, too, the Court has invoked tradition in sanctioning government support for religion. In *Marsh v. Chambers*, a legislative chaplaincy was upheld as an "uninterrupted" practice with origins predating the Constitution.[46] In *Walz v. Tax Commission*, tax exemptions for churches were allowed because the exemptions were longstanding and accordingly considered to indicate "the national attitude" toward the question of whether freedom from taxation constituted the affirmative government support barred by the establishment clause.[47] The *Walz* Court's deference to the tradition of church exemption was tantamount to an argument for a constitutional statute of limitations.[48]

The tradition and the original intent approaches part company where there is discontinuity between the original and the contemporary perceptions of a practice. In these instances, the Supreme Court has not deferred to original intent but has instead traced the evolution and change of the tradition. In *McGowan v. Maryland*, a challenge to the state blue laws, the Court traced the history of such laws, observing: "there is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces"[49] to mark the Christian day of rest. But the Court went on to reject the conclusion that "the State cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion."[50] According to the Court, since the blue laws have continued in force for secular reasons, Sunday is no longer of a "reli-

45. 370 U.S. 421, 424–29, 436 (1962). Efforts to portray public school prayer as a tradition overriding the longstanding opposition to government-sponsored prayer have been rejected by several Justices as historically wrong in light of the public schools' relatively recent development. See Wallace v. Jaffree, 472 U.S. 38, 80 (105 S. Ct. at 2503) (O'Connor J., concurring) & 105 S. Ct. at 2494 n.4 (1985) (Powell, J., concurring); Abington v. Schempp, 374 U.S. at 234–35, 239 (1963); Engel v. Vitale, 370 U.S. 421, 425–35 (1962).

As in *Everson*, the dissent in *Engel* would also rely on history. "What New York does with this prayer is to break with that tradition." *Engel* at 444 (Stewart, J., dissenting). Tradition was the Court's exclusive form of analysis supporting the legislative chaplaincy in Marsh v. Chambers, 436 U.S. 783 (1983).

46. 436 U.S. 783 (1983). The practice had in fact been interrupted by President Jefferson. *See* J. Fleet, "Madison's Detached Memoranda," 3 *Wm. & Mary Q.* 534, 562 (3d ser. 1946).

47. 397 U.S. 664, 678 (1970).

48. *Id.* at 678: "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside. 'If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' "

49. 366 U.S. 420, 431 (1961). See *id.* at 433–34, 440.

50. *Id.* at 445.

gious character," and accordingly state sponsorship of the holiday in contemporary times passes establishment clause scrutiny.[51]

In *McDaniel v. Paty*, the Court employed a similar historical approach to the constitutionality of laws disqualifying ministers from public office.[52] Chief Justice Burger's plurality opinion reviewed the history of the disqualification laws. While recognizing that at the time of the founding these laws were intended to buttress the separation of church and state, the Court observed the fears of clergy in public office have diminished with their involvement in public life over time. With the original establishment basis for the clergy disqualification laws relegated to the past, now these were regarded as clear infringements on religious liberty.

History plays a similar role in the Court's adjudication of free exercise claims. Where the Court finds a longstanding religious mandate, such as Sabbath observance, it is more likely to accommodate the practice.[53] Where there is not a clear founders' intent, such as concerning practices in the relatively modern public schools, at least Justice O'Connor has indicated she will not be bound by historical analogues. Nevertheless, with the tradition test now an established element in the jurisprudence of the religion clauses, it has became standard constitutional litigation strategy to cast religious practices which are contemporary as traditional.[54] Taking their cue from the Court, plaintiffs now must undertake to couch their claims to religious liberty in an entrenching history. In this way, the enduring tradition test posits a heavy burden on the newer religions, as well as invites deliberate distortions of history.

VII. BRIDGES TO A SHARABLE PAST

The tradition test, unlike originalism, is a dynamic approach to history in that it appears to allow a reconstitution of the American people as we change. But the tradition test also raises serious questions about the role of longstanding consensus in constitutional interpretation.

The tradition test is an entirely different response to the question which underlies the original intent debate about how the meaning of certain constitutional rights should be determined.

Intent analysis is premised on a settled debate. For the advocates of original intent, the meaning of establishment of religion is fixed at the

51. *Id.* at 444; see *id.* at 507 (Frankfurter, J., concurring) ("The spirit of any people expresses in goodly measure the heritage which links it to its past").

52. 435 U.S. 618 (1978).

53. E.g., Sherbert v. Verner, 374 U.S. 398 (1968).

54. See Lynch v. Donnelly, 465 U.S. 667, 674 (1984). But cf. *Id.* at 715–18 (Brennan, J., dissenting) (This case raises interesting questions about what constitutes a "tradition" in a relatively young country: Does a 40-year-old practice of displaying a Christmas nativity scene constitute a tradition?).

time of the founding and by the founders. By contrast, in looking to traditions or understandings over the generations, the Court has rejected a static determination of meaning at a particular moment in the past. The tradition test has allowed the Court to tell and retell a story without a fixed beginning or end. The Court's historical method has provided an evolving narrative of American religious traditions. Under the tradition test, the Court reviews practices over time and restates its interpretations as perceptions change.

To some extent the Court's tradition test in its church-state jurisprudence follows its general usage of history in constitutional jurisprudence.[55] History is seen as the backdrop for law. Legal terms acquire meaning as informed by longstanding societal understandings.[56]

The tradition inquiry's use of history is also true to the founders' political theory. The founders were concerned not merely with creating a democracy but with creating one which would last. To that end, the founders sought to identify national interests of some permanence.[57] In looking for traditions in its religion clause jurisprudence, the Court has attempted to identify precisely such enduring understandings.[58]

While in theory the tradition test appears to allow a flexible analysis, even under this approach to history the process of constitutional interpretation becomes imbued with a sense of inexorability. As historiographer of our religious heritage, the Court's declarations of tradition strive to be constitutive. The history must always come out right.[59]

Through the tradition inquiry in its religion clause jurisprudence the Court essentially endorses those understandings it deems to represent consensus over time. The Court has defined our national religious heritage, characterizing Americans as "a religious people";[60] it has sustained prayers in the state and federal legislatures,[61] government-sponsored Christmas displays,[62] and Sunday as an official holiday.[63] Under this test, in contrast,

55. See O. W. Holmes, "The Path of the Law," 10 *Harv. L. Rev.* 457, 472 (1897) ("Everywhere the basis of principle is tradition"); compare Youngstown v. Sawyer, 343 U.S. 579 (1952) (Frankfurter J., op.) (history of executive practices as gloss on the textual terms).

56. See R. Gordon, "Historicism in Legal Scholarship," 90 *Yale L.J.* 1017 (1981). For promoters among legal historians of a traditions approach to history in our jurisprudence see W. Nelson & J. P. Reid, *The Literature of American Legal History* 197 (1985).

57. See, e.g., *The Federalist Papers* No. 10 (Madison).

58. The Supreme Court's use of historical evidence of longstanding traditions in its church-state jurisprudence comports with at least one historian's view of what the founders comprehended by the term constitution: constitutive or shared understandings, which were entrenched independent of a document. See S. Sherry, "The Founders' Unwritten Constitution," 54 *U. Chi. L. Rev.* 1127, 1130 (1987).

59. See M. Howe, *The Garden and the Wilderness* 3–31 (1965). Compare K. Popper, *The Poverty of Historicism* (1957).

60. Zorach v. Clauson, 343 U.S. 306, 313 (1952) (Douglas, J.).

61. Marsh v. Chambers, 463 U.S. 783 (1983).

62. Lynch v. Donnelly, 465 U.S. 668 (1984).

63. McGowan v. Maryland, 366 U.S. 420 (1961).

minority religious practices which are relative newcomers to the American scene have not fared well. For example, a government-sponsored Nativity scene display has been upheld, but not one which was clearly Catholic.[64] Exemptions from government regulations for Sunday Sabbath observance have been granted, but not comparable accommodations for Jewish Sabbatarians. Amish school children have been excused from mandatory attendance requirements but not Evangelical school children.[65]

To the extent that the Court's tradition inquiry simply legitimates longstanding practices, it becomes a virtual proxy for the endorsement of majoritarian understandings and raises serious questions about the role of judicial review in the religion area.

Of greater concern is the fact that the tradition test does more than simply reflect the result of the political process; it provides a constitutional majority over time, that is, simple majorities compounded over the years. This results in interpretation which is even more conventional than that of a transient political consensus. Accordingly, the Court's conversion of the longstanding majority religion's understandings to the "traditional"—and ergo the constitutionally permissible—threatens the very values the establishment clause, interpreted at any level of generality, was intended to insure, the protection from governmental or majoritarian identification with religion.

More chronicler than prophet, the Supreme Court in the religion area has chosen tradition. Eschewing the pressing and grave problems of religious diversity, of difference, of majority/minority relations, which might point away from the protection of the structures and conventions of the past, the Court has aspired solely to continuity, to constitution over the years.[66]

64. Compare Lynch v. Donnelly, 465 U.S. 668, with Allegheny v. ACLU, 109 S. Ct. 3086 (1989).

65. Compare McGowan v. Maryland, 366 U.S. 420 (1961) (sustaining Sunday blue laws) with Thornton v. Caldor, 472 U.S. 703 (1985) (striking Sabbath Observer Law). Compare Wisconsin v. Yoder, 406 U.S. 205, 225–227, 229 (1972) (Amish employment of children on the farm "is an ancient tradition"), with recent evangelical cases, see, e.g., Mozart v. Hawkins, 827 F.2d 1058 (6th Cir. 1987).

66. In assuming the role of consolidator of our traditions, the Supreme Court has elected to forgo the prophetic role urged on it by several commentators. See, e.g., M. Perry, *The Constitution, the Court and Human Rights* 98–99, 101–14 (1982). See also R. Cover, "Bringing the Messiah Through the Law: A Case Study," *Nomos* XXX: *Religion, Morality and the Law* 202 (J. Pennock & J. Chapman ed. 1988). As a metaphor for law, Cover writes of a "bridge" which "connects the present" with the future "world we can imagine"; compare this vision with the law in the religion area oriented backward toward bridging the present to the past.